

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

REGION X

IN THE MATTER OF:	)	ADMINISTRATIVE
	)	SETTLEMENT AGREEMENT
	)	AND ORDER ON CONSENT
	)	FOR REMOVAL ACTION
	)	IMPLEMENTATION
Lower Duwamish Waterway Superfund	)	
Site Jorgensen Forge Early Action Area	)	U.S. EPA Region X
Seattle, Washington,	)	CERCLA Docket No. 10-2013-0032
	)	
Earle M. Jorgensen Company,	)	Proceeding Under Sections 104, 106(a), 107
	)	and 122 of the Comprehensive
	)	Environmental Response, Compensation,
	)	and Liability Act, as amended, 42 U.S.C.
Respondent.	)	§§ 9604, 9606(a), 9607 and 9622.
_____	)	

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## **I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Settlement Agreement and Order on Consent (Settlement Agreement) is entered into voluntarily by the United States Environmental Protection Agency, Region X (EPA), and by the Earle M. Jorgensen Company (EMJ) as Respondent. This Settlement Agreement provides for the performance of a non-time-critical removal action (NTCRA) by Respondent and the reimbursement of certain response costs incurred by the United States at or in connection with such action for the Jorgensen Forge Early Action Area (EAA) of the Lower Duwamish Waterway (LDW) Superfund Site (Site or LDW Site) in Seattle, Washington.

2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended (CERCLA).

3. EPA has notified the State of Washington Department of Ecology (State or Ecology) of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). Ecology is co-managing and overseeing cleanup of the LDW Site jointly with EPA, and is providing support for the implementation of this NTCRA at the Jorgensen Forge EAA.

4. EPA and Respondent recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Settlement Agreement do not constitute admissions of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the findings of fact, conclusions of law, and determinations in Sections IV and V of this Settlement Agreement. Respondent agrees to comply with and be bound by the terms of this Settlement Agreement and further agrees that it will not contest the basis or validity of this Settlement Agreement or its terms. Respondent agrees to undertake all actions required by this Settlement Agreement, including any

modifications thereto, and consents to and will not contest EPA's authority to issue or to enforce this Settlement Agreement. Except as expressly provided in this Settlement Agreement, the parties reserve all rights and defenses they may have.

## **II. PARTIES BOUND**

5. This Settlement Agreement applies to and is binding upon EPA and upon Respondent and its successors and assigns. Any change in corporate or business organization status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Settlement Agreement.

6. Respondent is liable for carrying out all activities required by this Settlement Agreement. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Settlement Agreement within 14 days from the Effective Date or within 14 days of their contract to work on the project, and that they comply with this Settlement Agreement. Respondent shall be responsible for any noncompliance with this Settlement Agreement, except as set forth in Section XVIII (Stipulated Penalties).

## **III. DEFINITIONS**

7. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

b. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

c. "Effective Date" shall be the effective date of this Settlement Agreement as provided in Section XXX.

d. "Engineering Evaluation/Cost Analysis" (EE/CA) shall have the definition and attributes described in the NCP, as may be modified by this Settlement Agreement.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

f. "Ecology" or "State" shall mean the State of Washington Department of Ecology and any successor departments or agencies thereof.

g. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States has incurred in planning, developing and negotiating this Settlement Agreement, in reviewing or developing plans, reports and other items pursuant to this Settlement Agreement, verifying the Work, or otherwise implementing, overseeing, or enforcing this Settlement Agreement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs incurred by EPA associated with EPA's preparation of any EPA decision documents (including any Action Memoranda), the costs incurred pursuant to Paragraph 23 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph 33 (emergency response), and Paragraph 59 (work takeover), as well as any other activities related to the Jorgensen Forge EAA undertaken by EPA and/or Ecology at Respondents' request.

h. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

i. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

j. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral.

k. "Parties" shall mean EPA and Respondent.

l. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

m. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.

n. "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Settlement Agreement and any appendix, this Settlement Agreement shall control.

o. "Statement of Work" or "SOW" shall mean the statement of work for implementation of the removal action, as set forth in Appendix A to this Settlement Agreement, and any modifications made thereto in accordance with this Settlement Agreement.

p. "Waste Material" shall mean 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and 4) any "dangerous waste" under RCW 70.95E.010(1).

q. "Work" shall mean all activities Respondent is required to perform under this Settlement Agreement.

#### **IV. FINDINGS OF FACT**

8. EPA finds the following facts which Respondent neither admits nor denies:

a. The LDW Site consists of an approximately 5.5- mile engineered waterway, formerly the northern portion of the Duwamish River which flows into Seattle, Washington (see Figure 1), and sources thereto comprising the areal extent of contamination. EPA and the Washington State Department of Ecology (Ecology) jointly issued an Administrative Order on Consent pursuant to CERCLA and the state Model Toxics Control Act (MTCA) for a remedial investigation and feasibility study (RI/FS) for the LDW Site on December 21, 2000 to The Boeing Company (Boeing), City of Seattle, Port of Seattle and King County. A Record of Decision (ROD) selecting remedial action for the LDW Site is anticipated within the next few years. EPA and Ecology also agreed for their mutual convenience in a Memorandum of Understanding that EPA will generally be lead agency for in-water portions of the LDW Site and Ecology will generally be lead agency for upland source control, and that the Agencies may alter these lead-support roles at any time for any portions of the LDW Site.

b. The LDW has served as Seattle's major industrial corridor since it was created by the United States Army Corps of Engineers, completed in 1917. Industrial uses of and along the LDW have been extensive since its construction. The LDW is also habitat to numerous fish and other aquatic species, and is a migratory corridor for threatened and other anadromous fish species. Sources of releases to the LDW include but are not limited to, industrial releases, combined sewer overflows and urban run-off. The Muckleshoot Tribe has a treaty-granted fishery in the LDW that is currently limited to salmon which live most of their lives in the open ocean. The Suquamish Tribe's treaty-granted usual and accustomed fishing area is just north and west of the LDW and includes fish that use the LDW as part of their home range.

c. On September 13, 2001, the LDW Site was listed on the National Priorities List pursuant to Section 105 of CERCLA, 42 U.S.C. 9605, at 66 Fed. Reg. 47583.

d. The Boeing Plant 2-Jorgensen Forge EAA is one of five EAAs selected during the RI by EPA and Ecology to address sediment hot spots within the LDW, based

primarily on concentrations of polychlorinated biphenyls (PCBs). For the purposes of this Settlement Agreement the term "Jorgensen Forge EAA" shall mean only the Jorgensen Forge portion of the "Boeing Plant 2-Jorgensen Forge EAA" selected during the RI. The Boeing Plant 2 portion will be addressed by Boeing as corrective action pursuant to RCRA. Appendix D to this Settlement Agreement depicts the Jorgensen Forge EAA. EPA is the lead agency for the Jorgensen Forge EAA with Ecology support. Ecology remains the lead agency for the upland portion of the Jorgensen Forge facility with EPA support. EPA is the lead agency for all corrective active action at or for the Boeing Plant 2 facility.

e. The Jorgensen Forge facility is located at 8531 E. Marginal Way S. in Tukwila, Washington (though it uses a Seattle mailing address) in an industrial area on the east bank of the LDW. It is adjacent to the Boeing Plant 2 facility to the north and to the Boeing Isaacson facility to the south. Major activities at the Jorgensen Forge facility have included metal forging, metal fabrication, metals reclamation and recycling. Respondent was the owner/operator of the facility from 1965 to 1992 during which time activities described in the preceding sentence were conducted. Jorgensen Forge Corporation, a Washington corporation primarily engaged at the facility in metal forging, fabrication, reclamation and recycling, succeeded Respondent as owner/operator of the facility and works cooperatively with Respondent pursuant to their contractual arrangements in addressing environmental issues at or for the facility.

f. On July 10, 2003, EPA issued an Administrative Order Consent for Sampling and Analysis at the Jorgensen Forge Property (2003 Order) to Respondent, which was formally amended on April 15, 2008 to require the completion of an Engineering Evaluation/Cost Analysis (EE/CA) for the Jorgensen Forge EAA by Respondent subject to EPA oversight. EPA concluded Respondent's work under the 2003 Order, as amended, consistent with the NCP and certified the successful completion of this work in a letter to Respondent dated February 1, 2012. The April 15, 2008 amendment to the 2003 Order also required the addition of the "Memorandum of Understanding:

Coordination at the Boeing and EMJ/Jorgensen Transition Zone Boundary Sediment Cleanup Areas; Lower Duwamish Waterway,” executed by Respondent, Boeing and Jorgensen Forge Corporation in September 2007, as an enforceable part of the 2003 Order. This Memorandum was also simultaneously incorporated by formal Amendment into the outstanding RCRA Administrative Order on Consent, U.S. EPA Docket Number 1092-01-22-3008(h) (1994 Boeing Order), issued on January 18, 1994, to Boeing. Both the 2003 Order and 1994 Boeing Order Amendments contain the assurance that the Memorandum shall also be an incorporated attachment or appendix to all future Orders issued by EPA to Respondent and/or Jorgensen Forge Corporation and/or Boeing regarding the sediment cleanup that is the subject of the Memorandum. The Memorandum is so incorporated as Appendix B to this Settlement Agreement. Based in significant part on the EE/CA, EPA issued an Action Memorandum (Appendix C hereto) on September 30, 2011, selecting the NTCRA for the Jorgensen Forge EAA.

g. Respondent is a Delaware corporation doing business in the state of Washington.

h. Respondent and Jorgensen Forge Corporation have been cooperating in the performance of the necessary response actions to date at or for the Jorgensen Forge EAA.

#### **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

9. Based on the Findings of Fact set forth above EPA has determined that:

a. The Jorgensen Forge EAA is a “facility” as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Jorgensen Forge EAA, as identified in the Findings of Fact above, includes “hazardous substances” as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and/or pollutants or contaminants which may present an imminent and substantial danger to the public health or welfare.

c. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is liable for performance of response action and for response costs incurred and to be incurred at the Jorgensen Forge EAA. Respondent is a past "owner" and/or "operator" of a portion of the facility at the time of a release(s), as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1); and/or arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances at the facility, within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The removal action required by this Settlement Agreement is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Settlement Agreement, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## **VI. SETTLEMENT AGREEMENT AND ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for the Site and the Jorgensen Forge EAA, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Settlement Agreement, including, but not limited to, all appendices to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

## **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR**

10. Respondent shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within 10 days of the

Effective Date. Respondent shall also notify EPA in writing of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least 7 days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondent. If EPA disapproves of a selected contractor in writing, Respondent shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within 30 days of EPA's disapproval.

11. Respondent, with EPA's approval, has designated Amy Essig Desai, Senior Scientist at Farallon Consulting, L.L.C., 975 5<sup>th</sup> Avenue NW, Issaquah, WA 98027; Email: [aedesai@farallonconsulting.com](mailto:aedesai@farallonconsulting.com); Telephone: 425.295.0810, as its Project Coordinator. Respondent's Project Coordinator shall be responsible for administration of all actions by Respondent required by this Settlement Agreement. To the greatest extent possible, the Project Coordinator shall be present or readily available during field work. EPA retains the right to disapprove any successor Project Coordinator. If EPA disapproves of a designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within 7 days following EPA's disapproval. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Respondent.

12. EPA has designated Aaron Lambert as its Project Coordinator. Except as otherwise provided in this Settlement Agreement, Respondent shall direct all submissions required by this Settlement Agreement to the EPA Project Coordinator at 1200 Sixth Avenue, Suite 900, M/S: ECL-111, Seattle, WA 98101.

13. EPA and Respondent shall have the right, subject to Paragraph 11, to change their respective designated Project Coordinator. Respondent shall notify EPA 7 days before any such change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

## **VIII. WORK TO BE PERFORMED**

14. Respondent shall perform, at a minimum, all actions necessary to implement the Statement of Work (SOW), which is attached as Appendix A.

15. The actions to be implemented generally include, but are not limited to, the implementation of the Action Memorandum for the Jorgensen Forge EAA (Appendix C), as set forth in the SOW.

16. EPA removal action guidance, in addition to other guidance referenced in the SOW, and any additional relevant guidance, shall be consulted in implementing the SOW.

17. The primary objective of this removal action is to significantly reduce the potential risk to human health and the environment resulting from potential exposure to contaminants present at the Jorgensen Forge EAA.

18. For all Work, EPA may approve, disapprove, require revisions to, or modify a deliverable in whole or in part. If EPA requires revisions, Respondents shall submit a revised deliverable within 30 days, or the duration identified in the Schedule of Deliverables in the attached Statement of Work, following receipt of EPA's notification of the required revisions, unless otherwise noted in the SOW. Respondents shall implement the Work as approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work and the schedule, and any subsequent modifications, shall be incorporated into and become fully enforceable under this Settlement Agreement.

19. Respondent shall not commence any Work except in conformance with the terms of this Settlement Agreement. Respondent shall not commence implementation of the Work developed hereunder until after receiving written EPA approval pursuant to this Section.

20. Reporting.

a. Respondent shall each submit a written progress report to EPA concerning its actions undertaken pursuant to this Settlement Agreement by the fifteenth (15) calendar day of each month after the Effective Date until termination of this Settlement Agreement, unless

otherwise directed in writing by the EPA Project Coordinator. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, a statement of the percent of the project completed to date, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. At least 30 days prior to the conveyance of any interest in real property at the Jorgensen Forge EAA owned or controlled by Respondent or by Jorgensen Forge Corporation, Respondent or the Jorgensen Forge Corporation shall give written notice to the transferee that the property is subject to this Settlement Agreement and written notice to EPA and Ecology of the proposed conveyance, including the name and address of the transferee. Respondent also agrees to obtain an enforceable agreement in writing from the Jorgensen Forge Corporation that their successor(s), if any, comply with the immediately preceding sentence and Sections IX (Site Access) and X (Access to Information).

21. Off-Site Shipments.

a. Respondent shall, prior to any off-site shipment of Waste Material from the Jorgensen Forge EAA to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

i. Respondent shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the

shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the removal action. Respondent shall provide the information required by Paragraph 21(a) and 21(b) as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Jorgensen Forge EAA to an off-site location, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send hazardous substances, pollutants, or contaminants from the Jorgensen Forge EAA to an off-site facility that EPA has certified as in compliance with the requirements of the statutory provision and regulation cited in the preceding sentence.

#### **IX. ACCESS**

22. If any portion of the Jorgensen Forge EAA, or any other property where access is needed to implement this Settlement Agreement, is owned or controlled by Respondent or by Jorgensen Forge Corporation, Respondent shall, commencing on the Effective Date, provide EPA and its representatives, including contractors, with access at all reasonable times to such property for the purpose of conducting any activity related to this Settlement Agreement. EPA shall provide reasonable notice under the circumstances to Respondent and to Jorgensen Forge Corporation concerning any EPA activities under this Settlement Agreement for which access to such property will be necessary, and absent emergency circumstances, shall attempt to coordinate with Respondent and/or Jorgensen Forge Corporation to minimize disruption to use of the property. In all cases, and notwithstanding any other provision of this Paragraph 22, EPA and Respondent shall comply with Jorgensen Forge Corporation security and access rules

established in conjunction with its contracts with the U.S. Navy, U.S. Navy suppliers, and other defense-related firms, which rules are summarized in Appendix E to this Settlement Agreement.

23. Where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than Respondent or Jorgensen Forge Corporation, Respondent shall use its best efforts to obtain all necessary access agreements within 30 days after the Effective Date, or as otherwise specified in writing by the EPA Project Coordinator. Respondent shall immediately notify EPA if after using its best efforts it is unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing its efforts to obtain access. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

24. Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

#### **X. ACCESS TO INFORMATION**

25. Respondent shall provide copies to EPA, upon request, of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Jorgensen Forge EAA or to the implementation of this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also make available to EPA, for purposes of investigation,

information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

26. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Settlement Agreement, specifically including contractor costs and documentation thereof, but specifically excluding deliverables required by the attached SOW on which EPA may rely in addressing the Jorgensen Forge EAA or the LDW Site, to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

27. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege in lieu of providing documents, it shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondent. However, no deliverable or formal correspondence with EPA created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

28. No claim of confidentiality shall be made with respect to any data submitted or to be considered by EPA with respect to the Jorgensen Forge EAA or the LDW Site, including, but

not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Jorgensen Forge EAA.

## **XI. RECORD RETENTION**

29. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Jorgensen Forge EAA, regardless of any corporate retention policy to the contrary. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

30. At the conclusion of this document retention period, Respondent shall notify EPA and Ecology at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or Ecology, Respondent shall deliver any such records or documents to EPA or Ecology. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, it shall provide EPA or Ecology with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondent. However, no deliverable or formal correspondence with EPA created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

31. Respondent hereby certifies that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Jorgensen Forge EAA since notification of potential liability by EPA or Ecology or the filing of suit against it regarding the Jorgensen Forge EAA and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## **XII. COMPLIANCE WITH OTHER LAWS**

32. Respondent shall perform all actions required pursuant to this Settlement Agreement in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all actions required pursuant to this Settlement Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements under federal environmental or state environmental or facility siting laws.

## **XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

33. In the event of any action or occurrence during performance of the Work which causes or threatens to cause a release of Waste Material from the Jorgensen Forge EAA that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Settlement Agreement, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the EPA Project Coordinator or, in the event of his/her unavailability, the Regional Duty Officer, Environmental Cleanup Office, Emergency Response Unit, EPA Region X, 206-553-1263, of the incident or conditions. In the event that Respondent fail to take appropriate response action as required by this Paragraph, and EPA takes

such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

34. In addition, in the event of any release of a hazardous substance from the Jorgensen Forge EAA, Respondent shall immediately notify the EPA Project Coordinator and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §§ 11001, *et seq.*

#### **XIV. AUTHORITY OF EPA PROJECT COORDINATOR**

35. The EPA Project Coordinator shall be responsible for overseeing Respondent's implementation of this Settlement Agreement. The Project Coordinator shall have the authority vested in an On-Scene Coordinator (OSC) by the NCP, including the authority to halt, conduct, or direct any Work required by this Settlement Agreement, or to direct any other removal action undertaken at the Jorgensen Forge EAA, as well as the authority of a Remedial Project Manager (RPM) as set forth in the NCP. Absence of the EPA Project Coordinator from the Jorgensen Forge EAA shall not be cause for stoppage of work unless specifically directed by the EPA Project Coordinator.

#### **XV. PAYMENT OF RESPONSE COSTS**

36. Payments for Future Response Costs.

a. Respondent shall pay EPA all Future Response Costs not inconsistent with the NCP. On a periodic basis, EPA will send Respondent bills requiring payment that include a SCORPIOS or other regionally prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors. Respondent shall make all payments within 30 days of

receipt of each bill requiring payment, as specified herein or as otherwise provided in Paragraph 39 of this Settlement Agreement.

b. Respondent payments greater than \$10,000 shall be made to EPA by Electronic Funds Transfer directed to the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York  
ABA=02103004  
Account=68010727  
33 Liberty Street  
New York, NY 10045  
Field Tag 4200 of the Fedwire message should read "D68010727  
Environmental Protection Agency (10KX).

Respondent shall make all payments of \$10,000 or less as required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing Respondent's name and address, the Docket Number of this Settlement Agreement, and appropriate EPA Site/Spill ID number 10XK, and shall be clearly designated as Response Costs: LDW Jorgensen Forge EAA. Respondent shall send the check(s) to:

US Environmental Protection Agency  
Superfund Payments  
Cincinnati Finance Center  
PO Box 979076  
St. Louis, MO 63197-9000.

c. At the time of payment, Respondent shall send notice that payment has been made, as indicated in Paragraph 12 above, to the U.S. Environmental Protection Agency, Finance Center MS-NWD, Cincinnati, OH 45268 or [acctsreceivable.cinwd@epa.gov](mailto:acctsreceivable.cinwd@epa.gov), and to the EPA Project Manager.

37. The total amount to be paid by Respondent pursuant to this Section shall be deposited in the Lower Duwamish Waterway Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at

or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

38. If payments for Future Response Costs are not made within 30 days of Respondent's receipt of a bill, Respondent shall pay Interest on the unpaid balance. The Interest on Future Response Costs shall begin to accrue on the date of Respondent's receipt of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

39. Respondent may dispute all or part of its bills for Future Response Costs submitted under this Settlement Agreement, if Respondent alleges that EPA has made an accounting error, or that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted accordingly. If the dispute is not resolved before payment is due, Respondent shall pay the full amount of the uncontested costs to EPA as specified in this Section on or before the due date. Within the same time period, Respondent shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondent shall simultaneously transmit a copy of both checks to the persons listed in this Section above, together with a copy of the correspondence that established and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Respondent shall ensure that the prevailing party in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within 10 days after the dispute is resolved.

#### **XVI. DISPUTE RESOLUTION**

40. Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes

arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

41. If Respondent objects to any EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, Respondent shall notify EPA in writing of its objection(s) within 14 days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondent shall have 14 days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through formal negotiations (the Negotiation Period). The Negotiation Period may be extended at the sole discretion of EPA.

42. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by both Parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, the Director of the EPA Region X Environmental Cleanup Office or his/her Associate Director (ECL Director) will issue a written decision on the dispute to Respondent. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondent's obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs. Any written statement of objections submitted by Respondent and any accompanying documentation shall be retained by EPA in an Administrative Record at the written request of Respondent or at EPA's discretion if there is no written retention request by Respondent.

#### **XVII. FORCE MAJEURE**

43. Respondent agrees to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Settlement Agreement, a *force majeure* is

defined as any event arising from causes beyond the control of Respondent or the Jorgensen Forge Corporation, or of any entity controlled by Respondent or the Jorgensen Forge Corporation, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work, increased cost of performance, or a failure to attain performance standards/action levels selected by EPA.

44. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a *force majeure* event, Respondent shall notify EPA orally within 24 hours of when Respondent first knew that the event might cause a delay. Within 10 days thereafter, Respondent shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim, including supporting documentation for such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

45. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Settlement Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused

by a *force majeure* event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension for performance of the obligations affected by the *force majeure* event.

### **XVIII. STIPULATED PENALTIES**

46. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in this Section for its failure to comply with the requirements of this Settlement Agreement specified below, unless excused under Section XVII (*Force Majeure*). “Compliance” by Respondent shall include completion of the activities under this Settlement Agreement or any work plan or other plan approved under this Settlement Agreement identified below in accordance with all applicable requirements of law, this Settlement Agreement, all Appendices, and any plans or other documents approved by EPA pursuant to this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement.

47. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 47(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1,000	1st through 7th day
\$ 2,000	8th through 14th day
\$ 3,500	15th through 30th day
\$ 7,500	31st day through 90th day

b. The final and all submitted drafts of the following Compliance Milestones, including all component plans, as defined in the SOW:

1. Final Design (including the separately tasked Draft Final Design in the SOW)
2. Removal Action Work Plan
3. Removal Action Completion Report
4. Long-term Operations Monitoring & Maintenance Plan (Task 4 in the SOW)

48. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate final and all submitted draft reports or other written documents pursuant to this Settlement Agreement that are not listed in Paragraph 47(b), and any failure to timely and adequately complete any Work required by this Settlement Agreement or any approved plan or report:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1st through 7th day
\$ 1,000	8th day through 14th day
\$ 2,500	15th through 30th day
\$ 5,000	31st day through 90th day

49. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and 2) with respect to a decision by the ECL Director under Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the ECL Director issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

50. Following EPA's determination that Respondent has failed to comply with a requirement of this Settlement Agreement, EPA may give Respondent written notification of the failure and describe the noncompliance. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondent of a violation.

51. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondent's receipt from EPA of a demand for payment of the penalties, unless

Respondent invokes the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to the Lockbox number and address set forth in Paragraph 36b, above, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and the appropriate Site/Spill ID Number as set forth in Paragraph 36b, above, the EPA Docket Number of this Settlement Agreement, and the name and address of the parties making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 12, and to other receiving officials at EPA identified in Paragraph 36c, above.

52. The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the Work required under this Settlement Agreement.

53. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

54. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 50.

55. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided

herein, except in the case of a willful violation of this Settlement Agreement or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph 59. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

#### **XIX. COVENANT NOT TO SUE BY EPA**

56. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work and for Future Response Costs. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondent of all obligations under this Settlement Agreement, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondent and does not extend to any other person.

#### **XX. RESERVATIONS OF RIGHTS**

57. Except as specifically provided in this Settlement Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law. Respondent reserves all rights and defenses it may have to such actions.

58. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondent to meet a requirement of this Settlement Agreement;
- b. liability for costs not included within the definition of Future Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Jorgensen Forge EAA; and
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Jorgensen Forge EAA.

59. Work Takeover. In the event EPA determines that Respondent has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondent may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondent shall pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other

provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

## **XXI. COVENANT NOT TO SUE BY RESPONDENT**

60. Respondent covenants not to sue and agrees not to assert any claims or causes of action against EPA, or its contractors or employees, with respect to the Work, Future Response Costs, or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Jorgensen Forge EAA, including any claim under the United States Constitution, the Washington State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Jorgensen Forge EAA. The covenants not to sue in this Section shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 58 (b), (c), and (e) - (g), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

61. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

## **XXII. OTHER CLAIMS**

62. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of

Respondent. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement.

63. Except as expressly provided in Section XIX (Covenant Not to Sue by EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Settlement Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

64. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

### **XXIII. CONTRIBUTION**

65. The Parties agree that:

a. This Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Settlement Agreement. The “matters addressed” in this Settlement Agreement are the Work and Future Response Costs.

b. This Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondent has, as of the Effective Date, resolved its liability to the United States for the Work and Future Response Costs.

c. Nothing in this Settlement Agreement precludes the United States or Respondent from asserting any claims, causes of action, or demands for indemnification,

contribution, or cost recovery against any persons not parties to this Settlement Agreement. Nothing herein diminishes the right of the United States, pursuant to Sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

66. Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Settlement Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Respondent further agrees that with respect to any suit or claim for contribution brought against it for matters related to this Settlement Agreement, it will notify EPA in writing within 10 days of service of the complaint on it. In addition, Respondent shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

67. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Jorgensen Forge EAA or this Settlement Agreement, Respondent shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding should have been addressed in this Settlement Agreement; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in this Settlement Agreement.

#### **XXIV. INDEMNIFICATION**

68. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, or

subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Settlement Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Settlement Agreement. Neither Respondent nor any such contractor shall be considered an agent of the United States.

69. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

70. Respondent waives all claims against EPA for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Jorgensen Forge EAA, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Jorgensen Forge EAA, including, but not limited to, claims on account of construction delays.

## **XXV. INSURANCE**

71. At least 7 days prior to commencing any field Work under this Settlement Agreement, Respondent shall secure, and shall maintain for the duration of this Settlement Agreement, comprehensive general liability insurance and automobile insurance with limits of 5

million dollars, combined single limit. Within the same time period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. In addition, for the duration of the Settlement Agreement, Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Settlement Agreement. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

## **XXVI. FINANCIAL ASSURANCE**

72. Within 30 days of the Effective Date and on the anniversary of the Effective Date every year thereafter until Notice of Completion of Work in accordance with Section XXVIII below is received from EPA, Respondent shall establish and maintain financial security in the amount of \$7.09 million to assure the Work and any other obligations required under this Settlement Agreement in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work;
- b. One or more irrevocable letters of credit equaling the total estimated cost of the Work;
- c. A trust fund;
- d. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with Respondent; or
- e. A demonstration that Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f).

73. If Respondent seeks to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 72(d) of this Section, Respondent shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Respondent seek to demonstrate its ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 72(d) or (e) of this Section, it shall resubmit sworn statements conveying the information required by 40 C.F.R. 264.143(f) annually, on the anniversary of the Effective Date. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Respondent shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 72 of this Section. Respondent's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Settlement Agreement.

74. If, after the Effective Date, Respondent can show that the estimated cost to complete the remaining Work has diminished below \$7.09 million, Respondent may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondent shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Respondent may reduce the amount of the security in accordance with the written decision resolving the dispute.

75. Respondent may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondent may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

## **XXVII. MODIFICATIONS**

76. The EPA Project Coordinator may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the EPA Project Coordinator's oral direction. Any other requirements of this Settlement Agreement may be modified in writing by mutual agreement of the Parties.

77. If Respondents seek permission to deviate from any approved work plan or schedule or Statement of Work, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the EPA Project Coordinator pursuant to Paragraph 76.

78. No informal advice, guidance, suggestion, or comment by the EPA Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

## **XXVIII. NOTICE OF COMPLETION OF WORK**

79. When EPA determines, after EPA's review of the Final Removal Action Completion Report, that all Work has been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including post-removal controls and monitoring, if any, payment of Future Response Costs, or record retention, EPA will provide written notice to Respondent. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Removal Action Completion Report in accordance with the EPA notice.

Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Settlement Agreement.

#### **XXIX. SEVERABILITY/INTEGRATION/APPENDICES**

80. If a court issues an order that invalidates any provision of this Settlement Agreement or finds that Respondent has sufficient cause not to comply with one or more provisions of this Settlement Agreement, Respondent shall remain bound to comply with all provisions of this Settlement Agreement not invalidated or determined to be subject to a sufficient cause defense by the court's order.

81. This Settlement Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Settlement Agreement. The following appendices are attached to and incorporated into this Settlement Agreement:

- a. Appendix A: Statement of Work.
- b. Appendix B: Memorandum of Understanding: Coordination at the Boeing and EMJ/Jorgensen Transition Zone Boundary Sediment Cleanup Areas; Lower Duwamish Waterway.
- c. Appendix C: Action Memorandum for the Jorgensen Forge EAA.
- d. Appendix D: Depiction of Jorgensen Forge EAA.
- e. Appendix E: Access to Jorgensen Forge Company Property.

#### **XXX. EFFECTIVE DATE**

82. This Settlement Agreement shall be effective on the day it is issued by EPA. The undersigned representative of Respondent certifies that s/he is fully authorized to enter into the terms and conditions of this Settlement Agreement and to bind Respondent to this document.

### XXXI. NOTICES AND SUBMISSIONS

83. Documents including work plans, reports, approvals, disapprovals, and other correspondence which must be submitted under this Settlement Agreement, shall be sent to the individuals at the addresses specified below, unless those individuals give written notice of a change to the other parties. All notices and submissions shall be considered effective one business day after receipt by Respondent's Project Coordinator, unless otherwise provided. Upon request by EPA, Respondent shall submit such documents in electronic form.

- a. Two (2) copies of documents submitted to EPA shall be forwarded to:

Aaron Lambert  
U.S. Environmental Protection Agency  
1200 Sixth Avenue, ECL-111, Suite 900  
Seattle, Washington 98101

- b. One (1) copy of documents submitted to EPA shall be forwarded to:

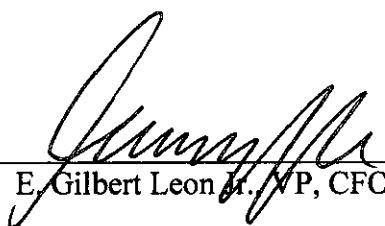
Maureen Sanchez  
Washington Department of Ecology  
Northwest Regional Office  
3190 160<sup>th</sup> Avenue SE  
Bellevue, Washington 98504

It is so ORDERED and AGREED.

By: Cami Grandinetti  
Cami Grandinetti  
Remedial Program Manager  
Environmental Cleanup Office  
U.S. EPA, Region X

Date: 11/5/12

For Respondent Earle M. Jorgensen Company:

By:  \_\_\_\_\_  
E. Gilbert Leon Jr., VP, CFO

Date \_\_\_\_\_